Supreme Court, U.S.
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No. 00-680

In The

Supreme Court of the United States

THORPE HOLDING COMPANY PROFIT SHARING PLAN, THOMAS A. CARPENTER, and THORPE HOLDING COMPANY,

Petitioners,

v.

SHIRLEY W. STEWART,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I

STATEMENT OF THE CASE

This case arises under the Employee Retirement Income Security Act (ERISA) of 1974 as amended. Shirley Stewart was formerly married to Richard C. Nielsen. Richard C. Nielsen was a participant, trustee, and plan committee member responsible for the administration of the Thorpe Holding Company Profit Sharing Plan defendants (hereafter the Plan) during his employment at the Thorpe Holding Company (Company). Record 1 at Exhibit 1 pp. 10-12. Prior to July 24, 1988, plaintiff Shirley Stewart was married to Richard C. Nielsen. Record 1 at Exhibit 2. On July 24, 1988 the Superior Court of California, County of Los Angeles, Judge James R. Ballew presiding, entered judgment ordering dissolution of the marriage between Shirley Nielsen (Stewart) and Richard C. Nielsen. Record 1 at Exhibit 2. Attached to the Superior Court's judgment is the marital settlement agreement (MSA) executed by Shirley Stewart and Richard Nielsen. Record 1 at Exhibit 2 pp. 1-6. Richard Nielsen, as Petitioners in the divorce action, on July 21, 1989, reviewed, signed, and received as acceptable the marital dissolution settlement agreement. Record 1 at Exhibit 2 p. 6.

The MSA details the disposition of pension/retirement benefits contained within the plan. Record 1 at Exhibit 2 pp. 4-6. The marital settlement agreement declares that Shirley Stewart's share of the pension plan is one-half of the community interest. *Id.* The MSA defines the community share as those shares obtained up to and including January 1, 1988, specifically 17,295.47 shares. *Id.* The MSA stipulates that the value as of March

15, 1989 of $9.78 per share. *Id.* The MSA specifically states that Shirley Stewart is entitled to one-half of the total shares of 17,295.47. *Id.* The MSA lists both Shirley Stewart's mailing and legal addresses. Record 1 at Exhibit 2 p. 4. This address is 8109 Michigan Avenue, Whittier, legally described as Parcel 1, City of Whittier as shown on Parcel 1, Map 5724 filed in book 60, page 94 of the parcel maps in the office of the County Recorder. *Id.*

In addition to being a participant in the plan, Richard Nielsen was a plan trustee and plan administrator. Record 27 Exhibit 2 (deposition of Thomas Carpenter) and Record 1 Exhibit 1 at pp. 10-12. The Company is the plan administrator. Record 1 at Exhibit 1 p. 10. Thorpe has delegated the responsibility of handling the duties of plan administrator to the Committee. *Id.* The Summary Plan Description (SPD) lists as Committee members John E. Allen, Thomas A. Carpenter, Richard C. Nielsen, and Carl R. Twyman. *Id* at 12. Between 1989 and 1992, Richard Nielsen acted as a trustee and plan administrator of the Plan. Record 27 at Exhibit 1 p. 9:5-12. The SPD contains no explanation for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order. Record 1 at Exhibit 1 p. 9. The Plan defendants received notice of the MSA on July 13 and July 21, 1989. Record 4 at 6; and Record 1 at Exhibit 2 p. 6.

On September 25, 1989, Thomas Carpenter, plan administrator, instructed Kemper Financial Services to transfer 9225.197 shares in the account of Richard Nielsen to Shirley W. Nielsen (Stewart) at 8109 Michigan Avenue, Whittier, California 90602. Record 27 at Exhibit 5. On May 8, 1991, Thomas Carpenter wrote to Shirley Stewart concerning the transfer of shares owed to her. Record 27 at

Exhibit 3. Thomas Carpenter took the action to effectuate and help the transfer of shares to Shirley Stewart at the request of her ex-husband Richard Nielsen, plan administrator and trustee. Record 27 at Exhibit 1 pp. 19:2-20:2 and 26:14-17. Mr. Carpenter took additional steps with respect to Shirley Stewart's shares. Mr. Carpenter instructed the transfer of the shares belonging to Shirley Stewart to an Individual Retirement Account (IRA) "designated by Richard C. Nielsen." Record 27 at Exhibit 4.

Shirley Stewart never received any shares from the Plan. Subsequent to Richard Nielsen's retirement in early 1992, Thomas A. Carpenter directed that after the transfer of 9225.197 shares into an IRA designated by Richard Nielsen all remaining shares were to be liquidated. Record 27 at Exhibit 4. On December 14, 1992 the Plan defendants distributed to Richard Nielsen the shares of the pension account, including those shares awarded to Shirley Stewart by the MSA. *Id.*

The district court concluded that under ERISA the only people with standing to bring an action against the plan are plan participants, beneficiaries, fiduciaries of the plan, and the Secretary of Labor. Record 30 at 3:19-21. The district court found that ERISA provides an exception to the standing requirements in the case of a qualified domestic relations order. Record 30 at 4:6-9. The district court concluded that Shirley Stewart's MSA was not a qualified domestic relations order. Record 30 at 4:6-28 and 5:1-5. The district court held that no genuine issue of material fact remained for trial and granted defendant's motion for summary judgment. *Id*, at 5:7-11. The district

court found that the MSA did not contain Shirley Stewart's address. The district court found that the MSA did not define the "period to which such order applies." Record 30 at 4.

The United States Court of Appeals for the Ninth Circuit reversed. The court first held that the MSA was a valid qualified domestic relations order (QDRO). (*Pet. App.*, pp. 10-23). The court found that the MSA satisfied all four QDRO requirements under ERISA and that the MSA left no uncertainty concerning the identity of the beneficiary. (*Pet. App.*, pp. 10-11). The circuit court rejected the district court and Petitioners' argument that any defect in the precise language of the MSA does not render it a non-QDRO. (*Id*, at 11-12). The court provided extensive analysis of the relevant case law and statutory provisions demonstration that the district courts exaltation of form over substance is legal error. (*Id*, at 12-23).

The court further found that absent a valid QDRO, Shirley Stewart retained standing to sue based on the unique facts of this case. (*Pet. App.*, pp. 23-28). The Ninth Circuit determined that the provisions governing ERISA and QDRO granted Stewart standing. *Id*. The failure of Stewart's ex-husband, a plan trustee responsible for administration of the plan, and the other defendants before the district court to discharge their fiduciary duty consistent with the provisions of ERISA provided Shirley Stewart with the right to challenge the determination of the plan that her MSA is not a valid QDRO. (*Pet. App.*, at pp. 23-28 and fn. 14.). The court specifically found that Stewart's standing does not exist to challenge a breach of fiduciary duty; rather, the challenge is to the implicit

determination by the plan that the MSA is not a QDRO. (*Pet. App.*, at fn. 14).

II

SUMMARY OF THE ARGUMENT AND REASONS FOR DENYING THE WRIT

Petitioners present three questions. The first is whether the plain language of ERISA governing state domestic relations orders, 29 U.S.C. § 1056(d)(3), requires a domestic relations order to clearly specify the name and last known mailing address of the participant and alternate payee covered by the order, where the plan administrator had knowledge of that requirement, independently of that order. Pet. at *i*. Petitioners argue that the Ninth Circuit's opinion conflicts with the Tenth Circuit's construction of the QDRO provision of ERISA. According to Petitioners, the Tenth Circuit's holding in *Hawkins v. Commissioner of Internal Revenue*, 86 F.3d 982 (10th Cir. 1996) squarely conflicts with the Ninth Circuit's "liberal" reading of the QDRO requirements and that the two decisions are irreconcilable. Pet. at 12-13. Petitioners attempt to create a conflict where none exists. The Tenth Circuit's opinion is not contrary to the Ninth Circuit's holding in this matter, and does not hold what Petitioners claim it holds; rather like the present matter before the court, the Tenth Circuit in *Hawkins* itself applied the requirements of ERISA consistent with the Ninth Circuit's opinion in this matter.

In the second subpart within the first question, Petitioners argue that the Ninth Circuit's opinion conflicts with this Court's rules for construing statutes. Pet. at *i*.

Petitioners argue, the Ninth Circuit's opinion "conflicts" with dozens of this Court's decisions regarding the basic canons of statutory construction and cannot invoke the exception to those canons. The decision of the Ninth Circuit is consistent with this Court's numerous holdings regarding multi-faceted rules of statutory construction. The result reached by the Ninth Circuit, finding a valid QDRO in this matter, avoids a "patently absurd result," which would otherwise allow a plan and its administrators to violate the law of ERISA.

The second question is whether, when the defendant raises for the first time a new issue on appeal, couched as a jurisdictional challenge, that issue is waived. Petitioners argue that the Ninth Circuit erred in failing to reach an issue first raised on appeal. Petitioners present their argument as a jurisdictional one relevant to standing. It is not. Petitioners' position merely attempts to raise for the first time on appeal a new issue not previously raised and has nothing to do with jurisdictional issues. The Ninth Circuit did not enter a dispositive judgment or direct the entry of judgment.

The third question offered by Petitioners is whether a plaintiff has standing to sue under ERISA where that standing is a result of the breach of fiduciary duty of the plan administrators. Pet. at *i*. Petitioners argue that the Ninth Circuit's decision in this matter adds to the split among the circuits regarding the "but for" issue of standing currently existing among the circuit courts. The Ninth Circuit did not find standing existed as a result of Petitioners' breach of their fiduciary duty. Standing was found as a statutory right granted to Stewart by the relevant provisions of ERISA.

III

ARGUMENT

A

PETITIONERS' CONTENTION THAT THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE TENTH CIRCUIT DECISION IN *HAWKINS* IS WITHOUT MERIT

Petitioners' contention, that the Ninth Circuit decision in this matter is in conflict with the Tenth Circuit's decision in *Hawkins v. Commissioner of Internal Revenue*, 86 F.3d 982 (10th Cir. 1996), plainly misreads the holding in the case. Petitioners argue that *Hawkins* held that relaxing the specificity requirements of the statute would involve the Courts in a subjective inquiry not intended by ERISA. Pet. at 12-13. Petitioners' citation to and reliance on *Hawkins* is misplaced. The petition constitutes an incomplete review of that decision.

While it is correct that *Hawkins* did indeed profess to adhere to a strict interpretation of the QDRO provisions and refrain from a subjective inquiry, its application demonstrates another intent. The Tenth Circuit had before it a marital separation agreement that contained the following provision purporting to be a QDRO:

> the ex-spouse is to receive "[c]ash of One Million Dollars . . . from Husband's share of the Arthur C. Hawkins, D.D.S. Pension Plan," and that Arthur "shall immediately allow [Glenda] to take possession of the property transferred [to her] by this Agreement."

Hawkins, 86 F.3d at 992. Clearly absent from the *Hawkins* QDRO is any indication whatsoever as to any address of

either party. According to Petitioners' interpretation of ERISA and the *Hawkins* decision, the domestic relations order in *Hawkins* could not constitute a valid QDRO. Yet the Tenth Circuit found the language to satisfy the QDRO requirements.

The Tenth Circuit found a QDRO based on the lower court finding that the address requirement was not necessary because the plan administrator "clearly possessed that information" independently of the agreement. *Hawkins*, 86 F.3d at 993. The Tenth Circuit's elimination of a relevant QDRO provision demonstrates that the Ninth Circuit's finding of a QDRO does not conflict with *Hawkins*. The decision in *Hawkins* does nothing to support Petitioners' argument and does in fact represent a harmony with the Ninth Circuit's well-reasoned analysis.[1]

While the language *Hawkins* employs suggests the need to strictly adhere to the QDRO provisions of ERISA, the result in *Hawkins*, as in this matter, is the same. Namely, the conclusion that where the benefit plan has independent knowledge of the relevant address at issue, it cannot elevate form over substance. The decisions of the Ninth and Tenth Circuits demonstrate no conflict other than one imagined by Petitioners in this matter and therefore those decisions do not call for a review by this

---

[1] The Ninth Circuit itself recognized the lack of conflict with the Tenth Circuit in *Hawkins*, devoting a lengthy analysis of how *Hawkins* actually militates in favor of its interpretation of ERISA's specificity requirements for a valid QDRO, and that a close reading of the *Hawkins* decision demonstrates agreement between the two circuits. See, *Stewart*, 207 F.3d at 1154-55.

Court. This Court should reject Petitioners' petition for a writ of certiorari.

B

THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S RULES FOR STATUTORY CONSTRUCTION

Petitioners argue that the Ninth Circuit disregarded the plain language of the relevant statute in favor of legislative history. Pet. at 14-17. Petitioners also argue that the Ninth Circuit decision is in direct conflict with the decision of the Tenth Circuit in *Hawkins v. Commissioner Of Internal Revenue*, 86 F.3d 982 (10th Cir. 1996) and out of step with this Court's "decades" of instruction on how lower courts should construe statutes. Pet. at 17. Petitioners' entire position is without merit.

Petitioners' contention that the Ninth Circuit has disregarded the plain language of the relevant statute in favor of legislative history is wholly without merit and ignores this Court's prior decisions. Petitioners' contention that the Ninth Circuit relied on legislative history to reject the plain language of the relevant ERISA provision puts a gloss on a judicial opinion that is well supported by the decisions of this Court. That argument further attempts to entice this Court into a knee-jerk acceptance of Petitioners' petition for a writ of certiorari by raising the talisman of judicial activism and judicial legislating where none exists.

Petitioners argue that the Ninth Circuit has violated a basic canon of this Court that where the language of a statute is plain, the duty of the courts is to enforce the

statute according to its terms. Pet. at 14. Petitioners cite a litany of decisions by this Court applying that canon in support of its argument. Pet. at 14. What Petitioners fail to demonstrate, and what is fatal to its position, is that the Ninth Circuit's opinion does not rely on a single piece of legislative history in finding a valid QDRO. Rather, the opinion is based on this court's equally hallowed canon regarding statutory construction of remedial legislation – a canon Petitioners have chosen to ignore, but one that the Ninth Circuit has not.

The interpretation of ERISA must be guided by the " 'familiar canon of statutory construction that remedial legislation must be construed broadly to effectuate its purposes.' " *Belland v. Pension Ben. Guar. Corp.*, 726 F.2d 839, 849 (D.C. Cir. 1984) (*quoting Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967)). *See also, Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 684, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (remedial statute should be liberally and beneficently construed); 3 N. Singer, Sutherland Statutory Construction § 60.01 (5th ed.1992). This canon frequently has been applied in interpreting Federal statutes conferring benefits and rights on employees. *See, Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) (Federal Employers' Liability Act); *Corning Glass Works v. Brennan*, 417 U.S. 188, 208, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974) (Equal Pay Act); *Haberman v. Finch*, 418 F.2d 664, 667 (2nd Cir.1969) (Social Security Act). *See also, Forshey v. Gober*, 226 F.3d 1299, 1303 (Fed. Cir. 2000) (applying same rule to veterans' benefits statute); and *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998) (applying the same rule to Americans with Disability Act).

The ERISA is likewise remedial in nature and thus should not be applied grudgingly, but rather should be construed liberally to avoid frustration of its beneficial legislative purposes. As recognized by the Ninth Circuit in this matter, this Court's own holdings have found that the purpose of ERISA's QDRO provisions were designed to protect the community property rights of ex-spouses like Stewart in ERISA pensions. *See, Stewart,* 207 F.3d at 1146 and 1153 (*citing Boggs v. Boggs,* 520 U.S. 833, 845, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997). *See also, Ablamis v. Roper,* 937 F.2d 1450, 1453 (9th Cir. 1991)).

As this Court stated in *Boggs,* essential to the QDRO provisions of ERISA and its central purpose "is to give enhanced protection to the spouse and dependent children in the event of divorce or separation. . . . " *Boggs,* 520 U.S. at 845 and 847. Petitioners' position would have this Court reject the remedial purpose of the QDRO provisions and impede that goal which the Legislature had intended. This court has observed:

> It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute:
>
> "The general words used in the clause . . . taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by an enlightened tribunal because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a

> statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law. . . . "

Bob Jones University v. United States, 461 U.S. 574, 585, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983) (quoting *Brown v. Duchesne*, 19 How. 183, 194, 15 L.Ed. 595 (1857)) (emphasis supplied in *Bob Jones*). *See also, Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985) ("literal statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose clearly manifested in an entire statute or statutory scheme or with clear legislative history.").

This Court has affirmatively found that ERISA and the QDRO provisions are remedial in nature. *See, Boggs, supra*. Therefore the legislative history in this case is not a crutch on which the Ninth Circuit must rely; rather it is an important extrinsic aid in determining how the ERISA should be interpreted and applied, consistent with the express and patent purpose of that legislation. The Ninth Circuit's reliance on legislative history was merely one aspect of a complex decision.

As the Ninth Circuit and other circuit court's have properly determined, absent from this case is one of the other evils that QDRO's seek to remedy, namely, the " 'litigation-fomenting ambiguities as to who beneficiaries designated by a divorce decree are.' " *Stewart*, 207 F.3d at 8 (citation omitted); *see also, Metropolitan Life Insurance Company v. Wheaton*, 42 F.3d 1080, 1084 (7th Cir. 1994); *Carland v. Metropolitan Life Insurance Company*, 935

F.2d 1114, 1120 (10th Cir. 1991); and *Hurwitz v. Sher*, 982 F.2d 778, 781 (2nd Cir. 1992).

As Petitioners demonstrate to this court, the holding in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), does not allow for application of the plain language of a statute where "patently absurd consequences" would result. Pet. at 15. This is such a case. As the Ninth Circuit recognized, Nielsen as Stewart's ex-husband – and also as a Plan trustee and fiduciary – knew Stewart's address because he executed the Marital Settlement Agreement that is incorporated into the Marital Dissolution Order. His conduct as one of the Plan trustees in the weeks and months following the execution of the MSA further attests to his and therefore the Plan's imputed knowledge of Stewart's mailing address. For example, the letter that he directed Carpenter to send to Stewart two months after the divorce was sent to the address of the family residence that the Marital Dissolution Order awarded to Stewart. *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1151 (9th Cir. 2000).

Therefore, the MSA in this matter did not provoke the litigation fomenting disputes the QDRO provisions were meant to avoid. Rather, that litigation is a result of the plan's instance that the MSA is not a QDRO because it fails to satisfy the address requirement, even where Richard Nielsen, Stewart's ex-husband, plan trustee, and plan committee member, and Thomas Carpenter, plan administrator, demonstrated the plan, knew of Mrs. Stewart's address and the precise amount awarded to Shirley Stewart. As the court in *Hawkins* demonstrated, the requirements of 29 U.S.C. § 1056(d)(3)(C), are not so inflexible

that the plan could have conceded actual knowledge of Stewart's address.

Petitioners have failed to demonstrate that the Ninth Circuit failed to apply the plain language of the relevant statutes. No reason exists for this court to grant the writ of certiorari. The Ninth Circuit's opinion does not violate "decades" old canons established by this court. Instead, that opinion is consistent with and adheres to this Court's canons regarding the treatment of remedial legislation and the need to construe broadly that legislation to effectuate its purposes. Petitioners' position seeks to turn the remedial nature of the QDRO provisions into a sword with which it may attack and deny its obligation to Shirley Stewart. As the Ninth Circuit properly found, consistent with this Court's long line of cases, the QDRO provisions are not a sword to be wielded by a plan, its administrator, or fiduciary; rather the QDRO provisions are a shield meant to protect Shirley Stewart and her right to benefits adjudicated to constitute divisible marital property. The Ninth Circuit's application of that shield stands consistent with the language of the statute and the remedial purpose of ERISA. That was proper in all respects and does not call for review by this Court.

C

THE NINTH CIRCUIT CORRECTLY HELD THAT THE PLAN HAD FAILED TO RAISE AN ISSUE IN THE CONTEXT OF COURT REVIEW OF A BENEFIT DETERMINATION BY A PLAN FIDUCIARY

Petitioners argue for rehearing based on the Ninth Circuit's correct finding that the issue of whether Richard

Nielsen's address is or is not included in the MSA was waived by the plan because it failed to raise that issue below. Pet. at 18-19. Petitioners argue that the Ninth Circuit erred in finding this issue waived, contending that that court may affirm based on any alternative grounds not relied upon by the district court. *Id.* Petitioners are wrong as a matter of substantive law of ERISA. The Ninth Circuit's finding that the Petitioners failed to raise the issue of whether Richard Nielsen's address was contained within the MSA, and therefore waived that issue is the proper determination. The plan also waived the issue by not raising the lack of Mr. Nielsen's address as part of the administrative decision.

Although Petitioners attempt to phrase its argument on this question as jurisdictional regarding standing, it is not. The question raised by Petitioners has nothing to do with Stewart's standing in this matter. Petitioners' issue relates to factual issue rejected by the Ninth Circuit.

As a preliminary matter it is important to note that the Ninth Circuit's finding that "[t]he absence of any injustice is all the more true because ERISA clearly relaxes the need to specify the 'last known mailing address[es]' of the participant and alternate payee by qualifying the requirement with the statement 'if any,' " is well supported by the relevant case law. *See, Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d at 1150 fn. 6 (quoting 29 U.S.C. § 1056(d)(3)(C)(i)). Several Circuits have found that the requirement is satisfied by either including the mailing address of the plan participant's attorney or custodial parent and/or it is obvious that the plan was aware of the participant's address. In addition, the Tenth Circuit relaxed the address requirement to the

extent that it does not require an address to establish a QDRO. *Hawkins*, 86 F.3d at 993 (finding a valid QDRO could exist even when no addresses were listed in the divorce papers).

The MSA in this case contains the address of Mr. Nielsen's attorney. Record 4. If the plan was unsure of Mr. Nielsen's address it simply need contact his attorney. More importantly, Richard Nielsen was a trustee of the plan. As a plan trustee there is no doubt that Mr. Nielsen knew his own address and either did or could have communicated that to the plan. The plan's own correspondence demonstrates that it knew Mr. Nielsen's mailing address and how to reach him. Therefore, the Ninth Circuit implicitly considered and rejected the Petitioners' argument raised for the first time on appeal.

Additionally, applying the analysis in the *Hawkins* decision, the fact that the plan was aware of and knew Mr. Nielsen's address forecloses any claim by the plan that the MSA was not a QDRO. The articulation by Petitioners that the QDRO is somehow defective because it did not contain Mr. Nielsen's last known address, if any, was merely a *post hoc* rationale advanced for the first time by the plan's counsel before the Ninth Circuit.

The plan made no administrative finding as to the validity of the QDRO. The plan also chose not to raise the issue of Mr. Nielsen's address before the district court. ERISA contains a comprehensive civil enforcement scheme that includes exhaustion of remedies before the plan. 29 U.S.C. § 1133. The regulations promulgated by the Secretary of Labor require that any denial of a claim for benefits have a statement of the specific reasons for

the denial as well as a statement of the additional material needed to perfect the claim. 29 C.F.R. § 2560.503-1(f)(1) and (3). The lack of an address of Mr. Nielsen, even if germane, was never raised as a specific reason for the denial of benefits by the Thorpe Holding Company Profit Sharing Plan as an affirmative defense to the payment of benefits.

Amato v. Bernard, 618 F.2d 559, 566 (9th Cir. 1980) requires that the participant exhaust the claims procedures specified within the plan. The salutary effects of requiring exhaustion and the regulatory requisite to state the reasons for denial are obvious. If all parties are aware of the contentions of the other, then the plan will face a lower volume of litigation. Similarly, if a plan must state all of the reasons for denial, then participants and beneficiaries need not guess as to the defenses that the plan will raise in court. These two expected results of bilateral exhaustion will lower the expense and frequency of litigation enhancing the ability of the court to conduct trials on the record. *Kearney v. Standard Insurance Co.*, 175 F.3d 1084, 1094-1095 (9th Cir. 1999) (en banc). Thus, the Court should view the *review* of determinations by ERISA fiduciaries in the same manner as it *reviews* determinations by administrative agencies.

In *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 169, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962) (*quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947)) this Court cast the rule of law as:

> a reviewing court . . . *must judge the propriety of such actions solely by the grounds invoked by the agency*. If those grounds are inadequate or

> improper, the court is powerless to affirm the administrative action.

(Emphasis added). Since the reasons stated by the plan administrator contain no mention of any lately perceived inadequacies of the MSA as a QDRO, the Petitioners could not raise it for the first time on appeal to the Ninth Circuit. To do so would frustrate the requirements of the regulations demanding that the plan state the reasons for denial at the outset, not in an appellate brief. 29 C.F.R. § 2560.503-1(f)(1). Petitioners can raise new theories in general on appeal, but not when the substantive law of ERISA requires that the Petitioners state all of the reasons before the matter even gets to court.

The Ninth Circuit properly determined that Petitioners failed to raise the above issue before the district court. As the Ninth Circuit stated "absent a reason for failing to raise this issue in district court, we find no manifest injustice in declining to address it on appeal." *Stewart*, 207 F.3d at 1150 fn. 6. Additionally, the Ninth Circuit also properly found that even if it were to reach the issue presented for the first time on appeal, "the absence of any injustice is all the more true because ERISA clearly relaxes the need to specify the 'last known mailing address[es]' of the participant and alternate payee by qualifying the requirement with the statement "if any." *Id*, (quoting 29 U.S.C. § 1056(d)(3)(C)(i)). The Ninth Circuit's declination of an issue raised for the first time on appeal was proper and does not call for review by this Court.

D

WHATEVER SPLIT EXISTS AMONG THE CIRCUITS RELATING TO THE "BUT FOR" ISSUE HAS NO RELEVANCE TO THE PRESENT MATTER AND NEED NOT BE ADDRESSED BY THIS COURT

Petitioners' final argument seeks this Court's review in order to resolve a split among the circuit courts of appeals regarding the issue of whether standing may be established based on a "but for" analysis of a fiduciary's conduct. While Petitioners do indeed present a thorough analysis of the current disagreements among the circuits regarding that issue, the resolution of that split finds no place in the current matter before this court. Contrary to Petitioners' misreading of its opinion, the Ninth Circuit did not find standing to exist "but for" the fiduciary violations of Petitioners; rather the standing flows from the plain language of the relevant statutes.

Petitioners' attempt to couch the Ninth Circuit's decision in this case as necessitating the resolution of a split among circuits, distorts that holding and only serves as a vehicle to garner this Court's attention. The Ninth Circuit's decision in this case does not add to the "but for" split currently existing among the circuits. The Ninth Circuit's finding of standing is merely the application of the plain language of the statutes involved. As the Ninth Circuit clearly laid out in its decision, standing results from the statutes:

> Specifically, upon receipt of "any domestic relations order" – such as the Marital Dissolution Order in this case – a plan administrator must "promptly notify the participant and any other alternate payee of the receipt of such order" and

> advise them of "the plan's procedures for determining" whether the order is a QDRO. 29 U.S.C. § 1056(d)(3)(G)(i) (emphasis added). "[W]ithin a reasonable time after receipt of such order, the plan administrator shall determine whether such order is a [QDRO] and notify the participant and each alternate payee of [its] determination." 29 U.S.C. § 1056(d)(3)(G)(ii). Moreover, while the order's status as a QDRO is being determined, the plan administrator is required to hold and separately account for amounts that would be payable to the alternate payee if and when the order is determined to be a QDRO. See 29 U.S.C. § 1056(d)(3)(H)(i). Should the plan administrator determine that an order does not qualify as a QDRO, the beneficiary or alternate payee may appeal the plan administrator's decision to a "court of competent jurisdiction" under 29 U.S.C. § 1056(d)(3)(H)(i).

(Footnote omitted, emphasis original). Clearly, Stewart's standing to bring the current action before the district court was not created by the violations of Petitioners of their fiduciary duties. Stewart's standing was not dependent on the illegal conduct of Petitioners in this matter. That standing existed, as the Ninth Circuit properly determined, when she first received her martial separation agreement. Petitioners have ignored the Ninth Circuit's clear and unequivocal statement contained within its holding.

Shirley Stewart does not need a valid QDRO to seek judicial review of the plan's determination. The relevant statutes provide to her that right, which the plan cannot take away. As the majority clarified:

> The dissent misconstrues our decision. We do not hold that Stewart has standing to sue defendants for violating their fiduciary duties under ERISA if a "court of competent jurisdiction" determines that her Marital Dissolution Order does not constitute a QDRO. Rather, we hold that under the plain meaning of 29 U.S.C. § 1056(d)(3)(H)(i), ERISA gives Stewart the right as an alternate payee to challenge in a "court of competent jurisdiction" the ERISA Plan's implicit determination that her Marital Dissolution Order does not qualify as a QDRO. We further hold that ERISA plan administrators cannot deny an alternate payee, such as Stewart, that right by breaching their fiduciary duties under ERISA. Finally, for the reasons discussed supra in Part III, we hold that the district court here erred in ruling that Stewart's Marital Dissolution Order did not constitute a valid QDRO under ERISA.

The analysis is clear. Shirley Stewart does not have standing to sue Petitioners if a "court of competent jurisdiction" determines her MSA is not a QDRO. Rather, she has standing to seek that determination. In the instant case, that court of competent jurisdiction has determined that she does indeed have a valid QDRO.

Petitioners' attempt to twist the Ninth Circuit's opinion to fit into a split among the circuit courts is an obvious attempt to create a controversy where none exists. Whatever split exists among the circuits relating to the "but for" issue of standing is not relevant to the present matter before this court. The ERISA statutes provide standing to Shirley Stewart to seek competent court review in this case. That is what she has done. The

holding of the Ninth Circuit that Stewart has standing to challenge the plan's implicit rejection of her MSA as a valid QDRO, and the subsequent decision by the Ninth Circuit that the MSA is a valid QDRO is proper in all respects and does not call for a review by this court. While "but for" standing may represent an issue for the Court to resolve, the issue is not present in this case.

IV

CONCLUSION

There exists no conflict in this case between the Ninth Circuit's decision and the other circuit courts. The Ninth Circuit's application of the relevant ERISA provisions in finding that Shirley Stewart's MSA is a valid QDRO, is consistent with the language of the relevant statutes and effectuates the remedial purpose of ERISA. That opinion also conforms and does not conflict with the Tenth Circuit's holding in *Hawkins*. Further, the Ninth Circuit's opinion is consistent with this Court's canons on statutory construction. The Ninth Circuit did not err in rejecting Petitioners' attempt to raise before it a new issue on appeal. Finally, Petitioners' belief that Shirley Stewart has no standing "but for" its breach of fiduciary duty is without merit. Stewart's standing flows from the statutes as recognized by the Ninth Circuit. For all the forgoing

reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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